No. 87-1200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY;
BOARD OF TRUSTEES OF ALABAMA A&M UNIVERSITY;
JOHN KNIGHT, *et al.*; and
NORMALITE ASSOCIATION, *et al.*,
Petitioners

v.

AUBURN UNIVERSITY; BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA; TROY STATE UNIVERSITY, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF RESPONDENT THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether two state created universities, as defendants in a suit filed by the United States to eliminate alleged vestiges of a former racially dual system of higher education, have standing to be realigned as plaintiffs and sue the state and its institutions and agencies because their individual board members believe there is a conflict between their oaths of office and prior actions of the state (some of which were committed by the petitioners) that caused the two universities to be in violation of federal constitutional and statutory provisions?

2. Whether, in a suit filed by the United States to eliminate alleged vestiges of a former racially dual system of higher education, this Court should review a decision by the court of appeals that two predominantly black state created institutions of higher education were improperly realigned as plaintiffs because they lack standing to pursue claims against the state and other state universities and agencies?

3. Whether, in a suit by the United States seeking to eliminate alleged vestiges of a former racially dual system of higher education, the court of appeals erred in holding that two state created universities lack standing under 42 U.S.C. § 1983 and the fourteenth amendment to sue for the benefit of their institutions, the state and other state universities and agencies?

4. Does a state created university have standing to sue the state and its institutions and agencies on behalf of the individual members of its board of trustees?

LIST OF PARTIES

Except for the National Alumni Normalite Association (NANA) and the University Legal Defense Fund (ULDF),[1] the parties in this Court are the petitioners[2] and the respondents, which consist of the United States of America (USA),[3] which was an appellee below, and the appellants below, namely: the State of Alabama, the Governor of Alabama, and the Alabama Public School and College Authority (APSCA); the Alabama State Board of Education (ASBE) and its members, who are parties in their official capacities and the Alabama State Superintendent of Education; the Board of Trustees of the University of Alabama (University of Alabama System—UAS) and the members of its Board, who are parties in their official capacities; Auburn University (AU) and the members of its Board, who are parties in their official capacities; and Troy State University (TSU) and the members of its Board, who are parties in their official capacities.

NANA and ULDF sought to intervene in the district court as parties. The district court denied them the right to intervene in the liability phase of the case but permitted them limited prospective intervention "for the purpose of providing the [district court] with their views on any plan of desegregation which may be presented to

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[1] NANA and ULDF are two separate support organizations for the Board of Trustees for Alabama Agricultural and Mechnical University (A&M), a public corporation. They are not parties in the court below and cannot be parties in this petition.

[2] The other petitioners are the Knight Intervenors (*see infra* n.6), the Board of Trustees for Alabama Agricultural and Mechnical University (A&M), and the Board of Trustees for Alabama State University (ASU).

[3] The USA filed this action in 1983. It did not join in this petition and has not sought review of the decision of the circuit court below either before that court or in this Court.

the Court . . . ." *See* Memorandum Opinion and Order Granting Limited Intervention (Nov. 28, 1984) reprinted at Appendix 1a-4a. The case has not moved beyond the liability phase. NANA and ULDF did not appeal or otherwise challenge the order of the district court limiting their intervention, and no other order has been entered changing or enlarging their status. They clearly are not parties in this Court or in the circuit court or district court below.[4] They did not participate in the trial of this case or in any of the several appellate actions, though their names have sometimes been added to joint briefs filed by the other petitioners. Their status is identical to that of the University of Alabama in Huntsville Foundation (UAHF), a support organization for the University of Alabama in Huntsville (UAH), which was granted limited intervention below but was not allowed to participate at the trial. *See* Memorandum of Opinion Denying UAHF's Motion to Intervene as of Right and Granting Limited Permissive Intervention (Feb. 25, 1985) reprinted at Appendix 5a-9a.

Two of the petitioners, A&M and ASU, were designated by the court of appeals as non-appealing defendants. They filed separate briefs but were allotted time during oral argument only upon the consent of the two appellees, the USA and the Knight Intervenors. If the petitioners are correct in their assumption that "parties in the district court which were not parties to the appeal in the court below . . . are therefore not understood to be parties in this Court" (Pet. iii), then this Court

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[4] A party which sought but was denied intervention in the court below may seek Supreme Court review of the denial of the motion to intervene but cannot petition for review of any other aspect of the decision. *See, e.g., NAACP v. New York*, 413 U.S. 345, 364-69 (1973); *Cascade Natural Gas Corp. v. El Paso Gas Co.*, 386 U.S. 129 (1967); *United Auto Workers v. Scofield*, 382 U.S. 205, 208-09 (1965).

should consider whether A&M and ASU are parties and petitioners in this Court.[5]

The Knight class[6] was a plaintiff intervenor in the district court below and an appellee in the circuit court below. The USA was an appellee in the circuit court below but did not join in this petition or separately petition for a writ of certiorari. There are numerous additional parties in the district court which were not parties to the appeal in the circuit court below and thus are not parties in this Court.[7]

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[5] A&M and ASU are the only petitioners seeking to review the court of appeals' decision that they were improperly realigned as plaintiffs. If A&M and ASU have a right to seek a review of their lost status as plaintiffs and the denial of their standing to bring claims, the assessment of the strength of that right should be affected by the fact that they did not challenge in the Eleventh Circuit their redesignation and loss of standing.

[6] The Knight Intervenors consist of John F. Knight, Katherine Coleman, Charles R. Anderson, Alma S. Freeman, John T. Gibson, Susan Buskey, Carl Petty, Tamara L. Knight, and Dennis Charles Barnett and (a) graduates of ASU, (b) black adult citizens or minor children of the State of Alabama who are presently attending or who are eligible to attend or who will become eligible to attend the public institutions of higher education in the Montgomery, Alabama, area, and (c) black citizens who were, are, or will become eligible to become employed by the public institutions of higher education in the Montgomery, Alabama area, as set out in the "Order of Class Certification" entered by the District Court on January 3, 1985.

[7] Those parties are: the Alabama Commission on Higher Education (ACHE); Jacksonville State University; the University of South Alabama; Livingston University; the University of Montevallo; the University of North Alabama; NANA and ULDF as limited intervenors; UAHF as a limited intervenor; and Thomas Braswell in his official capacity as comptroller of the State of Alabama and as comptroller of the Alabama Special Education Trust Fund. Athens State College (ASC) and Calhoun State Community College, operated by and under the ASBE, have sometimes been treated as parties.

All senior public institutions of higher education in the State of Alabama (all of which are parties in the district court below), with the exception of Athens State College operated by and under the ASBE, are separate public corporations created by the state legislature.[8] The corporate names of the UAS, ASU and A&M include the phrase "the Board of Trustees," *e.g.*, the Board of Trustees for Alabama Agricultural and Mechanical University. The petition is sometimes misleading by its failure to distinguish between the corporate names of A&M and ASU and their boards of trustees. The members of the boards of trustees of A&M and ASU are not parties in this action.

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[8] The boards of trustees of the UAS and AU have constitutional authority over the management and control of their institutions.

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CITATIONS TO THE OPINIONS AND JUDGMENTS BELOW

The petitioners have correctly described and reprinted in their Appendix the opinions and rulings below which relate to the realignment of A&M and ASU and their

standing to sue the State of Alabama, its officials, agencies, and other public universities.

JURISDICTION

Although the UAS questions the ability of some of the petitioners to join in this petition, it does not dispute the jurisdiction of this Court to act on the petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

For the reasons set out in its argument, the UAS does not believe that the issue of the status of A&M and ASU as plaintiffs and their standing to sue the State of Alabama, its officials and agencies, and other public universities, involves either the Supremacy Clause (U.S. Const. art. VI, cl. 2) or the Equal Protection Clause (U.S. Const. amend. XIV, § 1).

STATEMENT OF THE CASE

Following a "compliance review" of Alabama public institutions of higher education in 1978, the Office for Civil Rights (OCR) issued a "Letter of Findings" on January 7, 1981, requesting that the state submit a plan to eliminate alleged vestiges of segregation existing in the state senior institutions of higher education. Unsatisfied with the state's response, the Department of Education referred the matter to the Department of Justice for enforcement under Title VI of the Civil Rights Act of 1964. Acting upon that referral, the Attorney General filed this action on July 11, 1983. The complaint did not allege specific contemporary acts of race discrimination but charged that "vestiges" of a former dual system of higher education remained.

Almost immediately, A&M and ASU separately moved for realignment as plaintiffs or, in the alternative, to file cross claims. A&M asserted Title VI and fourteenth

amendment claims against UAS, AU, and the state. ASU asserted claims on a like basis against AU, TSU, and the state and sought the merger of Auburn University in Montgomery (AUM) and Troy State University in Montgomery (TSUM) under the control of ASU. Both motions were granted by the district court on September 26, 1983. A&M and ASU then filed separate motions for leave to file amended claims which the district court granted. In its amended claims, A&M alleged discriminatory treatment with respect to its land grant function and funding from the state and charged that the development of the University of Alabama in Huntsville (UAH), one of the campuses of the UAS, and other institutions in north Alabama was attributable to racially discriminatory reasons. The relief requested by A&M included the termination of major existing academic programs at UAH, the prohibition of new programs at UAH, and significant monetary and program enhancement of A&M, all so that A&M would become "the broad based public university in its immediate area."

In 1981, almost immediately after OCR issued its Letter of Findings, John F. Knight, Jr., and others described as administrators, faculty, students, and alumni of ASU, filed an action seeking the merger of AUM and TSUM into ASU. *Knight v. James*, United States District Court for the Middle District of Alabama, Civil Action No. 81-52-N. That district court certified a class of plaintiffs consisting of graduates of ASU and black citizens of Alabama who are eligible for employment by or who attend or may attend public institutions of higher education in the Montgomery, Alabama area. After the filing of this suit, the class plaintiffs in *Knight* moved to intervene in this action, which was granted, and the district court below certified the same class in this action. (*See supra* note 6).

The trial began on July 1, 1985, and concluded on August 2, 1985. On December 9, 1985, the district court

entered an order and memorandum of opinion in which it found that a racially dual system of higher education previously had been operated by the State of Alabama which had not been fully eliminated. The district court identified certain vestiges which it found to exist and ordered the state, the governor, ACHE, and APSCA to submit a plan to eliminate those vestiges.

An issue severed from the main case involving the recertification by ASBE of certain teacher education programs at ASU was heard on August 16, 1985, after the trial of the main case. On August 20, 1985, the district court enjoined ASBE from decertifying ASU's education programs. The ASBE appealed the injunction to the Eleventh Circuit, which affirmed the injunction on behalf of the Knight Intervenors and held that ASU had no right to sue the state or its agencies under Title VI, the fourteenth amendment, or 42 U.S.C. § 1983. *United States v. Alabama*, 791 F.2d 1450 (11th Cir. 1986) (Pet. App. 139a-154a). ASU first filed with the court of appeals a petition for rehearing and suggestion for rehearing *en banc*, which were denied, and then petitioned this Court for certiorari, which was also denied. *United States v. Alabama*, 791 F.2d 1450 (11th Cir. 1986), *cert. denied sub nom. Board of Trustees of Alabama State University v. Alabama State Board of Education*, 107 S. Ct. 1287 (1987).

Meanwhile, the district court overruled motions by the UAS and other defendants seeking review of the district court's order under 28 U.S.C. § 1292(b), all of which were denied by the district court. Thereafter, the UAS and other defendants filed notice of appeal under 28 U.S.C. §§ 1291 and 1292(a). On February 7, 1986, AU moved in the district court for a stay of further proceedings, but the court did not act on that motion. On February 13, 1986, UAS and AU filed separate motions for a stay in the Eleventh Circuit, which were granted on February 14, 1986. A&M, ASU, and the Knight Inter-

venors filed separate motions to dissolve the stay, which were overruled by the Eleventh Circuit on March 20, 1986; their accompanying motions to dismiss the appeals were "carried with the case."

On May 16, 1986, the same petitioners in this case petitioned this Court for a writ of certiorari seeking a dissolution of the stays entered by the Eleventh Circuit and a ruling that the appeal from the district court to the court of appeals was premature. While that petition was pending, the petitioners also filed Application No. A-239 with Justice Powell, to dissolve the stay orders issued by the court of appeals. On September 30, 1986, Justice Powell denied the Application, and on October 6, this Court denied the petition for writ of certiorari.

On October 6, 1987, the Eleventh Circuit rendered its opinion reversing the judgment of the district court and remanding the case with instructions that the complaint of the United States and the Title VI claim of the Knight Intervenors be dismissed without prejudice and that the remaining claims be assigned to another judge for a new trial or other proceedings. *United States v. State of Alabama*, 828 F.2d 1532 (11th Cir. 1987) (Pet. App. 1a-40a). Because of its reversal and remand on threshold questions, the court of appeals did not reach the merits of the district court's decision.

Upon remand, the case was reassigned as a result of a random drawing, and Judge Sam C. Pointer, Jr., the judge drawn, entered an order dismissing the complaint of the United States and the individual and class claims of the Knight Intervenors under Title VI without prejudice. That order is reprinted at Appendix 10a-11a. Subsequently, on December 21, 1987, the district court entered an order allowing the United States until February 21, 1988, and the Knight plaintiffs until March 21, 1988, to file any amended complaints. A copy of that order is reprinted at Appendix 12a-13a. The district

court recently extended the times for filing those amended complaints to March 23, 1988, for the United States and April 23, 1988, for the Knight plaintiffs.

REASONS FOR DENYING THE WRIT

This brief addresses the issue raised in the petition of the standing of petitioners A&M and ASU to assert claims in the case below under Title VI of the Civil Rights Act of 1964 and the fourteenth amendment against the State of Alabama and other state agencies and universities.

The sole basis urged by the petitioners for the grant of a writ on this ground is that the decision below conflicts with decisions of this Court and other courts of appeal. That perceived conflict derives from A&M's and ASU's misunderstanding that those cases hold that, because of the Supremacy Clause and the oaths of board members to uphold the United States Constitution, state created institutions and the members of their boards have unlimited rights to sue their creator and other state institutions to comply with constitutional provisions and protect constitutional rights.[1]

The petition should be denied for two principal reasons. First, the decision to which this petition is directed in

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[1] In their Statement of the Case, A&M and ASU complain that the court of appeals did not address their arguments that they could "raise claims either as representatives of their students and faculty, or in pursuance of the board members' obligation to carry out their own oaths of office to obey the Constitution . . . ." (Pet. 12). However because neither the questions submitted by the petitioners for review nor their reasons for granting the writ discuss standing predicated upon a right to pursue claims as representatives of their students and faculty, that argument is not before this Court. It was argued thoroughly in the prior petition by ASU to this Court which was denied. *United States v. Alabama*, 791 F.2d 1450 (11th Cir. 1986), *cert. denied sub nom. Board of Trustees of Ala. State Univ. v. Alabama State Bd. of Educ.*, 107 S. Ct. 1287 (1987).

fact did not address the standing issue—the court of appeals held only that A&M and ASU had been improperly realigned as plaintiffs. Its decision was simply an application of an earlier ruling in *Board of Trustees of Alabama State University v. Alabama State Board of Education*, 791 F.2d 1450 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 1287 (1987) (the 1986 Opinion) in which the standing issue was fully addressed and as to which this Court has already denied a writ of certiorari. Second, the petitioners' assertion that the decision below conflicts with decisions of this Court and of other circuits is wrong and is based upon a misunderstanding of those cases and the holding in this case.

I. The decision under review here addressed the improper realignment of A&M and ASU as plaintiffs, not their standing; A&M and ASU are asking this Court to review an earlier decision (the 1986 Opinion) which it previously has declined to review.

The petition plays a kind of "pea and shell" game with two different decisions below. This Court has previously declined to review the standing issue which is at the base of this petition. ASU unsuccessfully sought review by this Court of the 1986 Opinion written by Judge Frank M. Johnson, Jr., which held that ASU did not have standing under Title VI or the fourteenth amendment to sue the state or other state agencies. (Pet. App. 139a-154a). The present petition is nothing more than an attempt by ASU (joined now by A&M) to take another bite at the same apple.

The subsequent decision, which the present petition challenges, is simply an application of the earlier 1986 Opinion. In fact, the decision before this Court did not address standing *per se*. The court of appeals held only that the realignment of ASU and A&M as plaintiffs was improper. That *per curiam* opinion of Judges Vance and Kravitch of the Eleventh Circuit and Judge John R. Brown of the Fifth Circuit (sitting by designation) (the

1987 *per curiam* Opinion) addresses this issue in a footnote. (Pet. App. 5a, n.1). The decision can hardly be construed to make new law on the issue of standing or to warrant review by this Court under Supreme Court Rule 17.

In a "now you see it and now you don't" argument, the petitioners move back and forth between the 1987 *per curiam* Opinion and the 1986 Opinion as though they were the same, as though the time for seeking review by this Court of the 1986 Opinion had not run, and as though this Court had not previously declined to review that decision.

Clearly it is the 1986 Opinion that the petitioners seek to review. The petitioner asks "[w]hether the court below correctly held that a state university and its board members have no standing . . . ." (Pet. ii, Question 5). In their statement of the case, the petitioners assert "[t]he opinion below also held that the two state institutions and their boards of trustees lack standing to assert fourteenth amendment claims." (Pet. 11-12).

Though the 1986 Opinion primarily concerned certain educational courses offered only at ASU, A&M filed in that appeal an appearance and an extensive brief and submitted post argument material to the court of appeals, all in support of its position favoring standing. The Knight Intervenors also filed an appearance, a brief, and a post argument memorandum.

After the decision, ASU filed a petition for rehearing and suggestion for rehearing *en banc*, both of which were denied.[2] ASU then filed a petition for a writ of certiorari to this Court challenging that part of the order denying standing to ASU.[3] The United States opposed

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[2] *United States v. State of Ala.*, 796 F.2d 1478 (11th Cir. 1986).

[3] ASU argued that certiorari should be granted because the court of appeals erred "in holding that [ASU] had no standing to seek

that petition. This Court denied that petition. Unless there is some slight of hand, the pea (i.e., the decision petitioners seek to have reviewed by this Court) has to be either the 1987 *per curiam* Opinion relating to realignment or the 1986 Opinion relating to standing. The petitioners have not addressed the former but have directed their argument against the latter, a decision which this Court declined to review and which is no longer subject to review.

II. Neither the decision under review here nor the 1986 Opinion conflicts with decisions of the Supreme Court or other courts of appeal.

The decision in the 1987 *per curiam* Opinion that the district court improperly realigned A&M and ASU as plaintiffs relies on the 1986 Opinion and, in effect, holds that A&M and ASU lack standing to present fourteenth amendment and Title VI claims against the state universities and institutions under the facts and circumstances in the main case. Review by this Court is not warranted because that result does not conflict with existing decisions of the Supreme Court or other courts of appeal.

The petitioners misinterpret the application by different courts of the same legal principles to different facts as a conflict. Certainly state created public institutions are neither absolutely prohibited in all circumstances from suing their creator or other state institutions nor totally unlimited in their freedom to do so. If there is any conflict among the circuits and between the circuits and the Supreme Court, it is in those circuits which con-

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the preliminary injunction" and "in reaching the question of [ASU's] standing once [the court] had found another party who had obtained the same relief and who had unquestioned standing." Petition for Writ of Certiorari (by ASU) at 6 and 11, *Board of Trustees of Ala. State Univ. v. Alabama State Bd. of Educ.* (No. 86-749), *cert. denied*, 107 S. Ct. 1287 (1987).

tinue to adhere to a *per se* rule that creatures of the state never have standing to invoke constitutional provisions in opposition to the will of their creator. *Coleman v. Miller*, 307 U.S. 433 (1939); *Williams v. Mayor of Baltimore*, 289 U.S. 36 (1933); *City of Trenton v. New Jersey*, 262 U.S. 182 (1923); *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907). Compare *City of Safety Harbor v. Birchfield*, 529 F.2d 1251 (5th Cir. 1976) with *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979). In spite of the efforts of the petitioners to characterize the standing decision below as an application of the *per se* rule, it is clear the court of appeals did not adopt that approach; the court emphatically stated that "we cannot accept appellant's broad contention that ASU, as a creature of state government, has no federally protected rights whatsover under the Constitution or laws of the United States." (Pet. App. 142a). The court rejected a *per se* rule absolutely prohibiting a political subdivision from raising constitutional objections against its creator:

> Thus, no *per se* rule applies in this Circuit. In assessing the standing to sue of a state entity, we are bound by the Supreme Court's or our own Court's determination of whether any given constitutional provisions or law protects the interests of the body in question. However, if no such determination has been made, it is our task to review *de novo* whether the state entity has any rights under the particular rule invoked. (footnote omitted).

Pet. App. 143a-144a.

Obviously unpersuaded by the arguments of ASU (and of the Knight Intervenors and A&M on its behalf) that ASU had standing to pursue claims on behalf of its students and faculty and that the members of its board had a personal stake in, and were at risk because of, the constitutional duty to desegregate and their obligation to obey the Constitution through their oath of office, the

court returned to the long-standing general rule and cited *Coleman v. Miller*, 307 U.S. at 441, for the proposition that municipal corporations have no standing to invoke the fourteenth amendment of the Constitution in opposition to the will of their creator.[4] (Pet. App. 144a).

That the court of appeals did not apply a *per se* rule further appears in the explanation it made in distinguishing its ruling from that of *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982): "We are persuaded that *Seattle School District* may be harmonized with the conclusion of this Court that a creature of the state *normally* has no Fourteenth Amendment rights against its creator." (emphasis supplied) (Pet. App. 145a, n.5).

A&M and ASU erroneously read the Supreme Court and circuit cases they cited to hold that a state created institution may sue its creator in all circumstances in which the state institution believes there will be a malfeasance or nonfeasance of constitutional duty by it or the members of its board, unless it can sue.

A&M and ASU claim that the decisions below conflict with two decisions of this Court: *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982) and *Board of Education v. Allen*, 392 U.S. 236 (1968). Petitioners cite *Allen* for the proposition that a school board has "standing to challenge state laws and policies that the board believes will interfere with its duty to support the Constitution." (Pet. 25). First, *Allen* says nothing more than that the individual members of the board of education had a personal stake in the outcome of the litigation because of a conflict between their oath to support the Constitution and their refusal to comply with a state law, an act that would likely bring about their expulsion

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[4] In analyzing the public corporate character of the UAS, the Supreme Court of Alabama has likened it to a municipal corporation, a conclusion that would apply as well to A&M and ASU. *Cox v. Board of Trustees*, 161 Ala. 639, 648, 49 So. 814, 817 (1909).

and a reduction in state funds for their school district.[5] Though standing had been an issue in the state court proceedings, it was not an issue presented by any of the parties in the Supreme Court. Consequently, care should be exercised in reading too much into and applying too far the short footnote of *Allen*. Second, it should be noted that the "personal stake" found by the Court in *Allen* was obviously addressed to the members of the board of education and not to the entity itself. An entity cannot take an oath of office or be expelled from office. The individual board members of A&M and ASU are not and never have been parties in this lawsuit, either as plaintiffs or defendants. Third, the members of the board in *Allen* were faced with a state statute, imposed after the assumption of their duties, that specifically directed their conduct and the performance of their duties in ways that the state theretofore had not chosen to control. In effect, the state was directing the members of the board to take an action.

This Court has held that a personal stake in the outcome of a controversy is only a constitutional minimum for standing. *Warth v. Seldin*, 422 U.S. 490, 499 (1975). In *City of South Lake Tahoe v. California Tahoe*, 625 F.2d 231 (1980), the Ninth Circuit denied standing to the city on the "well established" principle that "political subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment." 625 F.2d at 233. As to the standing of the individual council members, citing *Warth; Schlesinger v. Reservists to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974); *O'Shea v. Littleton*, 414 U.S. 488 (1974); and *Sierra Club v. Morton*, 405 U.S. 727 (1972), the Ninth Circuit found that the council members had only an "official stake" and not a "personal stake" and that *Allen* was "an abrupt departure

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[5] *Board of Educ. v. Allen*, 392 U.S. 236, 241 n.5 (1968).

from settled precedent" in that it required nothing more for standing than "a forced choice between violation of the oath of office and potential expulsion from office." [6] *City of South Lake Tahoe*, 625 F.2d at 236-38.

Since the 1986 Opinion expressly does not adopt the *per se* rule discussed in *City of South Lake Tahoe*, the petitioners are wrong to argue that the court of appeals decisions below conflict with *Allen* or, for that matter,

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[6] Both the Ninth Circuit and the petitioners read *Allen* too broadly, though the Ninth Circuit ends with an application of the general rule against state institutions suing their creator which is consistent with *Allen*. Their error is in thinking that *Allen* demands nothing more "than a forced choice" to permit suit. *City of South Lake Tahoe*, 625 F.2d at 227. The difference in the board members in *Allen* (who had standing) and the council members in *City of South Lake Tahoe* (who lacked standing) is that the state statute requiring the purchase and lending of textbooks to parochial schools was directed specifically to the school board as the instrument to carry out the constitutionally suspect activity; the city council members, along with developers, realtors, contractors, owners of property, and the public in general, were all subject to the land use regulations and regional and transportation plans adopted by the political subdivision. The Ninth Circuit found such "official" interest of the council members to be an "abstract constitutional grievance" lacking "the specificity and adversarial coloration that transmute vague notions of constitutional principle into 'a form historically viewed as capable of judicial resolution.'" *Id.* at 328, citing *Schlesinger*, 418 U.S. at 218 which quotes *Flast v. Cohen*, 392 U.S. 83, 101 (1968). The *Allen* court did not say that *any* personal stake in the outcome and *all* beliefs of unconstitutionality, *ipso facto*, provide standing.

In the opinion of Justice White (Justice Marshall joining) dissenting from the denial by the Supreme Court of certiorari in the *City of South Lake Tahoe* case [449 U.S. 1039 (1980)], *Schlesinger* and *Richardson* did not overrule *Allen, sub silentio*, a position the Ninth Circuit did not have to reach in order to find that the council members lacked standing. However, Justice White would find in the council members a personal stake rather than a generalized interest of all citizens and would apply the holding of *Allen* to the standing of the city rather than a *per se* rule. *Id.* at 1041-42.

with the interpretation of Justices White and Marshall of the *Allen* and *City of South Lake Tahoe* decisions in their dissent from the denial of certiorari in *City of South Lake Tahoe*. 449 U.S. 1039 (1980). The petitioners may find a conflict between *Allen* on one hand and *City of South Lake Tahoe* and other courts of appeal decisions on the other, but they cannot find one between *Allen* and the court of appeals decisions below.

The only other decision of this Court which A&M and ASU contend conflicts with the decisions below is *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982). The 1986 Opinion distinguishes its holding from *Seattle*.[7] Without explanation or argument, A&M and ASU simply reject out of hand that explanation.[8]

The standing of the school board was not raised in *Seattle* and is not discussed in the majority or dissenting opinions. The petitioners misread *Seattle*: "[T]he lower court's holding is also contrary to this Court's recent decision in [*Seattle*], which conferred Fourteenth Amendment standing on a local school board . . . ." (Pet. 25-26). Even if this Court had made a specific ruling on standing in *Seattle*, the factual and legal circumstances surrounding the Seattle School Board and its claims are significantly distinguishable from those of A&M and ASU. The Seattle School Board was exercising its comprehensive, long-standing control over its transportation

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[7] The 1986 Opinion recognized that *Seattle* does not address the school board's standing but "harmonizes" its conclusions that ASU lacks standing with the school board's right to sue in *Seattle*, recognizing that a creature of the state *normally* has no fourteenth amendment right against its creator but can pursue those rights if the state reorders its political organization (i.e., its educational decision making process) in a way that violates the constitutional guarantee of equal protection. (Pet. App. 145a, n.5).

[8] "Petitioners believe the [1986 Opinion] analysis offers no basis for distinguishing between the situation of the Seattle school board and the Boards of Trustees of [ASU and ASM]." (Pet. 26).

system in order to facilitate the desegregation of its schools. The school board had the power and authority under state law to transport students, and it was doing so both generally and, in some instances, in a manner to further desegregation. A statewide initiative was drafted and proposed by those opposing the use of mandatory busing for racial integration and the people of Washington adopted it. Thus *Seattle* dealt with a state statute that was directed specifically to school boards, including the Seattle School Board; and it was specifically designed to terminate or thwart an activity the school board had already undertaken in the discharge of its constitutional duties. Because standing was not raised or discussed, one should not draw conclusions, as apparently have A&M and ASU, about the fact that the school board, rather than its individual members, was the suing party. Certainly there is no support at all in *Seattle* for the petitioners' argument that standing is inherent in the oaths of office of the board members.

Finally, the petitioners contend that the decisions below conflict with four decisions in four different circuits.[9] (Pet. 22-23). There is no conflict between the decisions below and *Baliles*. In *Baliles*, the court "found no vestiges of state-mandated segregation in [the Richmond Public Schools] that are appropriately remediable by the state defendants in a school desegregation suit following a finding of unitary status" and affirmed the district court's refusal to order state funding of remedial and compensatory programs. 829 F.2d at 1314. Since the only other plaintiffs did not appeal the district court decision, if the Fourth Circuit had found that the city

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[9] Fourth Circuit, *School Bd. of Richmond v. Baliles*, 829 F.2d 1308, 1310-11 (4th Cir. 1987); Second Circuit, *Aguayo v. Richardson*, 473 F.2d 1090 (2nd Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974); Sixth Circuit, *Akron Bd. of Educ. v. State Bd. of Educ.*, 490 F.2d 1285 (6th Cir.), *cert. denied*, 412 U.S. 932 (1974); and Eighth Circuit, *Brewer v. Hoxie School Dist. No. 46*, 238 F.2d 91, 99 (8th Cir. 1956).

board had no standing, then it could not have rendered an opinion affirming the district court and disposing of the claims against the state defendants.[10] In fact, the Fourth Circuit was simply reaffirming a prior district ruling of some fifteen years earlier that the school board had derivative standing.[11] A&M and ASU have not argued that basis for standing in this petition.[12] Finding no reason to overturn its standing ruling in *Bradley*, the Fourth Circuit confirmed it and speculated about other bases for standing: "[i]t would also appear that the School Board has standing to appeal [on other grounds] . . . ." *Baliles*, 829 F.2d at 1311. Of course the most significant differences between the decisions below and *Baliles* lie in the facts of each case, the nature of the state action complained of, and the bases claimed for standing. In *Baliles*, those matters arise out of the circumstances existing at the time of the *Bradley* decision when the district court first recognized the derivative standing of the school board; at that time, the district court found that "both the county and state defendants had committed constitutional violations that contributed to Richmond's segregated education system, and ordered interdistrict consolidation of the Richmond Public Schools and

[10] One can only speculate that the court's liberal finding of standing was motivated by its desire to lend greater judicial support to the district court decision against the individual plaintiffs and the school board and in favor of the state defendants.

[11] *Bradley v. School Bd.*, 338 F. Supp. 67, 229-30 (E.D. Va.), *rev'd on other grounds*, 462 F.2d 1058 (4th Cir. 1972), *aff'd by an equally divided court sub nom. School Bd. v. State Bd. of Educ.*, 412 U.S. 92 (1973).

[12] ASU did argue in its earlier petition to this Court seeking review of the 1986 Opinion that it had derivative standing on behalf of its faculty and students, a position that neither ASU nor A&M had asserted at any time in the case below. ASU could not make that claim because the Knight Intervenors specifically include those groups within their class (see n.6, *supra*), and A&M supported the intervention of the ULDF and NANA, both of which purported to represent the interests of those groups.

the schools in the neighboring counties." *Baliles*, 829 F.2d at 1310.

Aguayo is not in conflict with the decisions below and, in fact, should cause discomfort to the petitioners. In an opinion written by Chief Judge Friendly, the court noted the undisputed holding of the district court that the City of New York had standing to assert statutory claims against *federal defendants* but that under *Williams v. Mayor of Baltimore*, the city had no standing to assert constitutional claims. *Aguayo*, 473 F.2d at 1100. Judge Friendly, citing *Allen*, did recognize the standing of the Commissioner of the Department of Social Services of the City of New York based on a "personal stake in the outcome" because of a conflict between his oath to support the Constitution and his duty under state law to carry out the statutory projects. A&M and ASU sluff over the fact that their individual members are not parties in this action and that individual board members, not the public corporation, take whatever oath of office that may be required. The court also found in *Aguayo* that the city "is not a citizen entitled to privileges and immunities under section 2 of Article IV, or section 1 of the Fourteenth Amendment" and that the City of New York "lacks standing to assert constitutional claims against the State." 473 F.2d at 1100, 1101.

In *Akron*, a divided Sixth Circuit panel held that a local board of education and its superintendent had standing to sue the State Board of Education on behalf of its students to prevent a transfer of a small area in the Akron district to an adjoining suburban district. This case is distinguishable from the decisions below because, like the subsequently decided *Seattle School District* case, white students were being transferred from desegregated schools in Akron to all white suburban schools. *Akron*, 490 F.2d at 1288. Further, the court predicated standing on a derivative basis, finding the small number of students involved "would be much less likely to

come to the attention of said parents or arouse their concern . . . ." *Id.* at 1289. Though two of the three judges agreed that the board of education had standing, the concurring and dissenting judges agreed that the board could not bring suit under 42 U.S.C. § 1983. *Akron*, 490 F.2d at 1292 (Judge Pratt concurring) and at 1295 (Judge Weick, dissenting). The 1986 Opinion reached the same conclusion. (Pet. App. 144a-145a).

Finally, the petitioners' reliance on *Brewer* as a conflicting decision is completely inappropriate because that case involved a suit, not against a state or governmental entity, but against private individuals, corporations, and unincorporated associations to prevent them from interfering with the school district's desegregation of schools in the district. The suit was not against the state or any of its institutions or agencies.

III. Neither the decision under review here nor the 1986 Opinion warrants review because they are correct.

Accepting the assertions of A&M and ASU in their petition and without considering the salient factual differences between this case and those cases in which state created entities or their board members (or both) were held to have standing to sue their creator or its agencies, the foregoing discussion demonstrates that there is no conflict between the decisions below and prior decisions of this Court and the other circuits. However, there are matters not set out in the petition which reinforce the conclusion that there are no such conflicts and that the ruling below was correct.

A. The individual members of the boards of A&M and ASU are not parties.

The petitioners erroneously state that the members of their boards are parties and base their argument for a review of the decisions below on that error.[13] The de-

[13] "The opinion below also held that the two state institutions *and their boards of trustees* lack standing . . . ." (emphasis sup-

nomination of A&M and ASU in the caption and elsewhere in the petition suggests confusion about the identity of the parties before this Court.[14] A corporate entity cannot take an oath of office and cannot be removed for failure to obey such an oath. Even if the individual members of the boards of A&M and ASU were parties to this action, it is not clear that they are required to take an oath of office.[15] The cases cited by the petitioners in which the individual board members were parties, either alone or with their state entity, are clearly distinguishable from this case in which only the state entity is a party.

Essentially, the issue concerning the oath of office is not whether board members are obligated to support the U.S. Constitution but whether, in determining standing, an oath adds to or raises that obligation to a level above

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plied) (Pet. 11-12). "The above cases [the courts of appeal cases argued by the petitioners to be in conflict with the 1986 Opinion] typically involve public officials, like petitioners in this case, who have public duties to perform . . . In this case, for example, the petitioners have personal obligations, which they assume by taking their oaths of office . . . ." (Pet. 26).

[14] In the caption and throughout the petition, A&M and ASU are referred to as the "Board of Trustees *of* [A&M and ASU]." In the state statutes creating these institutions, they are denominated the "board of trustees *for* [A&M and ASU]." Presumably this difference in preposition is an oversight and not an attempt on the part of the petitioners to recharacterize the parties at this stage.

[15] Both the U.S. Constitution (art. VI) and the Alabama Constitution (art. XVI, § 279) require all state *executive* officers (among others) to take an oath, or to be bound by one, to support the U.S. Constitution. It is not clear that the members of a board of trustees of a separate public corporation created by the State of Alabama to manage and control a university are such executive officers. The Alabama Supreme Court has held that the requirement of an oath extends only to persons vested with the sovereign power of the state, something the board members of A&M and ASU do not exercise. *Burdette v. Coats*, 500 So.2d 1 (Ala. 1986).

that of ordinary citizens [16] and sufficient to override their duty of loyalty and commitment to the state creator and benefactor.

B. There is no conflict with the petitioners' constitutional duty to desegregate that provides standing for them to sue the state.

A&M and ASU are trying to use the oaths of office of their nonparty board members and the Supremacy Clause as abracadabras to ward off liability and to gain enhanced institutional status and funding. Unlike the Seattle School Board, the petitioners' incantation of constitutional obligations and remote, past state actions are in sharp conflict with their own role in and control over their racial identification. A&M and ASU have less constitutionally noble purposes. When the United States sued A&M, ASU, and the other public senior institutions of education in the State of Alabama alleging, on a system-wide basis, continuing vestiges of a former, racially dual system, to protect against deleterious remedies affecting their institutions, A&M and ASU confessed liability and sought to avoid remedy by transferring responsibility to the state and the other institutional defendants by suing them. A&M and ASU do not claim that they were engaged in specific actions to desegregate which were hindered or thwarted by specific state statutes or actions to that end; rather, they claim that their racial identification and other conditions that they confess violate Title VI and the fourteenth amendment result from past state actions and current failures to remedy them. If true, such "claims" are, at best, only defensive pleadings. If there are systemic vestiges of a former racially dual system within the State of Alabama that constitute violations of Title VI and the fourteenth

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[16] *See*, e.g., *Warth v. Seldin*, 422 U.S. 490 (1975); *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974); and *Sierra Club v. Morton*, 405 U.S. 727 (1972).

amendment, A&M and ASU are a part of that violation and are as vulnerable as any other state university to a remedy for the benefit, not of the universities, but of individuals, who are the beneficiaries of those provisions. The district court used A&M's and ASU's confession of liability and their standing and realignment to project, if not dictate, the nature and scope of any remedy affecting them.

If there is a threat to A&M and ASU in the United States' suit, it comes from their own failure to desegregate. In denying standing to the Governor of Mississippi in a suit by him and others challenging the statutory method for selecting members of the Mississippi State Board of Health, the court found that the governor (like the trustees of A&M and ASU) was "in no danger of expulsion from office as a result of any action that he alone believes may have violated his oath." *Finch v. Mississippi State Medical Ass'n*, 585 F.2d 765, 774 (5th Cir. 1978). The court also denied standing on another basis applicable to A&M and ASU:

> There is, however, another infirmity in the Governor's standing; he has not chosen to abide by the law he challenges, but to make nominations that disregard its provisions. Having chosen to break its fetters, he can no longer claim that they bind him. Thus, the governor has not been harmed by the law. He has not shown an injury to himself sufficient to warrant invocation of federal jurisdiction in his behalf. (citations omitted).

Id. at 774-75.

C. The efforts of A&M and ASU to sue the state and other state universities and institutions mask their hidden purpose of having the state support their institutions as separate but equal black universities.

A&M and ASU take the remarkable position that the constitutional and statutory violations, which they confess, necessitate a claim for substantial programmatic

and financial enhancement of their institutions so that they shall be equal to UAS and AU, the only two comprehensive and research doctoral granting universities in the state.

The claims of A&M and ASU sound in money damages, although in response to demands for a jury trial by some of the other defendants, A&M and ASU said they were not seeking damages but prospective relief in the form of increased capital and operating funds and new and expanded programs, all for the purpose of attracting white students. A&M and ASU lack either the insight or honesty of Pogo; they either fail or refuse to recognize that they are largely the current and ongoing cause of their condition. The evidence in the district court clearly established that the continuing racial identity of A&M and ASU is largely, if not totally, the product of their own actions.[17]

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[17] For example, the only evidence uncovered by the investigation of the OCR of practices designed to maintain the racial identity of an institution was found at A&M. OCR's investigating team found that at A&M "only black disadvantaged students are recruited and enrolled on a sustained basis," and the leader of that team said he probably "just sat there stunned" as the President of A&M articulated what was essentially a racially oriented mission for his institution. A&M acknowledged that its recruitment and hiring for faculty and administrative positions were guided by an effort to keep a direct relationship between the racial characteristics of the student body and the faculty and administrative staff. A&M's efforts to preserve its racial identity are even more apparent from its promulgation of an institutional mission statement listing "the education of capable afro-americans" as one of its primary objectives. ASU's record of discriminatory treatment of white faculty is unequivocally established in *Craig v. Alabama State Univ.*, 451 F. Supp. 1207 (M.D. Ala. 1978), *aff'd*, 614 F.2d 1295 (5th Cir.), *cert. denied sub nom. Dutt v. Alabama State Univ.*, 449 U.S. 862 (1980), which was shown to be continuing. *Craig v. Alabama State Univ.*, 804 F.2d 682 (11th Cir. 1986). Under such circumstances, petitioners can hardly lay at the doorstep of the state any blame for their inability to comply with the fourteenth amendment and Title VI. The denial to the petitioners of the right to sue other state

D. The decision below was that A&M and ASU were improperly realigned by the district court, and that is a correct decision.

The 1987 *per curiam* Opinion relied on the 1986 Opinion and held that, because A&M and ASU lacked standing, their realignment by the district court was improper. It is the 1987 *per curiam* Opinion that A&M and ASU are asking this Court to review. It is clearly a correct decision.

The district court bifurcated the trial below into liability and remedy phases. To date, the case has not gone beyond the liability phase. Before the introduction of any evidence, the district court granted the motions of A&M and ASU that they be realigned and allowed them to file claims against the state and the other defendant state universities and institutions.

Certainly predominantly black A&M and ASU constitute an essential part of the equation necessary to find system liability. Neither their institutions nor the role they may have played in maintaining any racial vestiges can be eliminated from the liability or remedy phase of the case. Before the trial, A&M and ASU requested, and the district court effectively granted to them, a virtual immunity to harm or burden in the remedy phase. Neither the fourteenth amendment nor Title VI should be vulnerable to that kind of self-serving manipulation under the guise of realignment and standing.

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agencies has absolutely no effect or limitation upon their ability to begin to recognize their obligations with respect to their own faculty and student bodies.

CONCLUSION

For the foregoing reasons, this Court should decline to review the decision of the court of appeals relating to the standing and realignment of A&M and ASU.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 83-C-1676-S

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs,

vs.

THE STATE OF ALABAMA, *et al.*,
Defendants.

[Filed Nov. 28, 1984]

MEMORANDUM OPINION AND ORDER GRANTING LIMITED INTERVENTION

Petitioners University Legal Defense Funds ("ULDF") and National Alumni Normalite Association ("NANA") seek intervention in this action so that they may ". . . give their input in any and all programs which may be devised to comply with the requests of the Complaint, for all such proposals would have a direct bearing on [them]."

ULDF is a non-profit corporation whose mission is, among other things,

> ". . . to secure financial compensation for Alabama A & M as a result of past years of discrimination funding, and to insure that Alabama A & M maintains its identity as a predominantly black institu-

> tion, while at the same time making its resources available to all qualified persons without regard to race, color, or creed."

NANA is an organization of alumni of Alabama A & M University, ("A&M") with a mission similar to that of ULDF.

Petitioners are not entitled to intervene as of right, because they have neither established an unconditional statutory right of intervention, nor have they established that any of their legally cognizable rights are inadequately represented by the existing parties.

However, the petitioners' claims include factual and legal questions common to those raised by the plaintiff and the re-aligned plaintiffs. To the extent that those questions relate to alleged statutory and constitutional violations, unrestricted intervention will unduly delay the adjudication of the rights of the original parties, since a trial date has already been set. More importantly, as to these alleged violations, petitioners' interests are co-extensive with those of A&M, a party to this action; and those interests are being adequately protected by A&M.

If the plaintiff and the re-aligned plaintiffs prevail in this action, it appears to the Court, in the exercise of its discretion, that ULDF and NANA should be heard on any proposed plans of desegregation. Accordingly, their intervention in the action should be limited to that of presenting to the Court their views, by testimony or otherwise, on any proposed plan of desegregation which involves A&M, should this case reach that post-trial stage.

It is therefore ORDERED that the University Legal Defense Fund and the National Alumni Normalite Association be granted limited intervention in this cause, for the purpose of providing the Court with their views on any plan of desegregation which may be presented to the

Court in the event that the plaintiffs and the re-aligned plaintiffs prevail at trial.[1]

DONE this 28th day of November, 1984.

/s/ U. W. Clemon
U. W. CLEMON
United States District Judge

[1] Counsel for ULDF and NANA need not be served with papers hereinafter to be filed in this case, other than this order, unless and until the Court renders a decision in favor of plaintiff and re-aligned plaintiffs.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 83-C-1676-S

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs,

vs.

STATE OF ALABAMA, *et al.*,
Defendants.

[Filed Feb. 25, 1985]

ORDER

For the reasons stated in the accompanying Memorandum of Opinion, the Petition of the University of Alabama Huntsville Foundation To Intervene As of Right is DENIED; and limited permissive intervention is GRANTED.

DONE this 25th day of February, 1985.

/s/ U. W. Clemon
U. W. CLEMON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 83-C-1676-S

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs,

vs.

STATE OF ALABAMA, *et al.*,
Defendants.

[Filed Feb. 25, 1985]

MEMORANDUM OF
OPINION DENYING UAHF'S MOTION TO
INTERVENE AS OF RIGHT AND GRANTING
LIMITED PERMISSIVE INTERVENTION

On January 9, 1985, petitioner University of Alabama Huntsville Foundation (UAHF) sought leave to intervene as of right in this action. It asserts that it has an interest in the University of Alabama at Huntsville (UAH), a predominantly white institution of higher learning; that the disposition of the action may impair or impede its ability to protect that interest, and that its interests are not adequately represented by existing parties. For the reasons which follow, the Court finds and concludes that the petition is due to be denied.

UAHF is a private, nonprofit corporation. Its origins date back to 1962, when a "Research Sites Foundation, Inc." was incorporated for "[t]he sole purpose of . . .

serv[ing] in any and all possible ways the interest of the University of Alabama Research Institute at Huntsville, Alabama." The predecessor of UAH, the Alabama Research Institute at Huntsville, was established in the same year. In 1964, the corporation assumed its present name. Since 1980, the Board of Directors of UAHF has included the Chancellor of the University of Alabama System, the President of the University of Alabama in Huntsville, and the members of the Board of Trustees of the University of Alabama residing in the Congressional District in which the University of Alabama in Huntsville is located.

Over the years, UAHF has made substantial contributions to UAH, consistent with its mission. It has contributed, or obligated itself to contribute, nearly $750,000 to UAH. It owns virtually all of the land in Research Park, the center of high tech development in Huntsville; and it is the principal land owning corporation in the area providing reasonably priced commercial sites.

However, despite its money and its mission, UAHF has no legally cognizable property rights in UAH.[1]

UAH was admittedly created by the unilateral action of the Board of Trustees of the University of Alabama, a defendant in this action. It is and has always been under the direction and control of that Board of Trustees. UAHF does not decide or dictate the curricula or course or program offerings at UAH; it does not approve its budget; it does not hire or fire its president, faculty, or staff; it does not own the property on which UAH sits; it does nothing more than its articles of incorporation require; it provides *support* for UAH, and that support

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[1] The Court recognizes that interests in property are not essential to intervention as of right, *Cascade Nat'l Gas Corp. v. El Paso Nat'l Gas Co.*, 386 U.S. 129 (1967), but "interests in property are the most elementary type of right that Rule 24(a) is designed to protect . . ." *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1124 (5th Cir. 1970).

is substantial. On the other hand, UAH has no control over UAHF. It lacks authority for example, to demand current income or past accumulation of income from UAHF, albeit that such income exists for the benefit of UAH.

UAHF's sole *raison d'ētre* is to provide funds to benefit UAH. Its interests lie in the continued existence of UAH as an institution. None of the parties, including A & M, have suggested that UAH be dismantled. So long as UAH remains an institution, the disposition of this action will not, as a practical matter, impair or impede UAHF's mission. Contrary to its argument, UAHF will not be bound by a judgment on the liability aspects of this case. It will remain free to continue its vigorous support of UAH.

The law of this circuit is that

> Intervention of right must be supported by "direct, substantial, legally protectible interest in the proceeding. *Howse, supra,* 641 F.2d at 302-21, *Piambino v. Bailey,* 610 F.2d 1306, 1321 (5th Cir. 1980); *United States v. Perry County Board of Education,* 567 F.2d 277, 279 (5th Cir. 1978); *Diaz v. Southern Drilling Corp.,* 427 F.2d 1118, 1124 (5th Cir. 1970); *see Donaldson v. United States,* 400 U.S. 517, 531, 91 S.Ct. 534, 542, 27 L.Ed. 2d 580 (1971) ("significantly protectible interest"). *In essence, the intervenor must be at least a real party in interest in the transaction which is the subject of the proceeding. See Piambino, supra,* 610 F.2d at 1321; *United States v. 936.71 Acres of Land,* 418 F.2d 551, 556 (5th Cir. 1969).

Athens Lumber Co., Inc. v. Federal Elections Com'n, 690 F.2d 1364, 1366 (11th Cir. 1982) (emphasis added). In no wise can UAHF be said to be a real party in interest in these proceedings.

UAHF has been aware of the pendency of this action since it was initially filed. At least one of the members of its Board of Directors is already a defendant in this case by virtue of his or her membership on the Board of Trustees of the University of Alabama and residence in the Congressional district in which UAH is located. In November, 1984, realigned plaintiff Alabama A & M University ("A&M"), the century-old predominately black institution of higher learning also located in Huntsville, filed a statement of its position. In that statement, A & M set forth its contentions concerning liability and relief. Alarmed at the relief requested by A & M insofar as the granting of such relief would affect existing and planned programs at UAH, UAHF filed this intervention petition on January 9, 1985. It should have been aware, from the outset of this litigation, that if liability were established, possible relief might affect existing and planned UAH programs and course offerings.

As of the date on which UAHF initially filed its intervention papers, the file in this case consisted of four volumes of pleadings and 85 volumes of discovery. Numerous depositions had been completed; others had been noticed. A pretrial conference had already been held; the principal pretrial conference was only three weeks away.

Counsel for the parties were, at that time, and they remain to this date, consumed in their preparations for trial, for they were informed last fall that the case would be tried not later than the summer of 1985.

Upon consideration of the factors enumerated in *Sallworth v. Monsanto*, 558 F.2d 257 (5th Cir. 1977), the Court finds that the intervention petition is untimely.

On the issues of whether the State of Alabama and its agents, agencies, and institutions have ever operated a dual system of higher education in Huntsville, Alabama; and, if so, whether that system and its vestiges have been eliminated, such interests as UAHF may possess are ade-

quately represented by the Board of Trustees of the University of Alabama. Indeed, those issues are vigorously being litigated by counsel; for the said Board of Trustees, as they properly should be, for the decisions and actions under challenge here are not those of UAHF; rather, they are decisions and actions of the University of Alabama Board of Trustees and the other named defendants.

UAHF is not liable for any of the decisions and actions; its incentive to litigate is not nearly as pressing as that of the Board of Trustees of the University of Alabama.

For all of these reasons, UAHF is not entitled to intervene as of right.

UAHF also seeks permissive intervention. For the reasons set out in the earlier part of this opinion, the Court finds and concludes that unlimited permissive intervention will unduly delay the adjudication of the rights of the original parties to these proceedings. Accordingly, UHAF will be granted a limited intervention—on the same terms and conditions as those previously imposed on putative interventors University Legal Defense Fund and the National Alumni Normalite Association.

By separate order, the petition to intervene as of right will be denied.

DONE this 25th day of February, 1985.

/s/ U. W. Clemon
U. W. CLEMON
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

No. CV 83-P-1676-S

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs,

-vs.-

STATE OF ALABAMA, *et al.*,
Defendants.

ORDER

In accordance with the instructions of the Court of Appeals, it is ORDERED as follows:

1. The complaint of the United States of America is DISMISSED without prejudice.

2. The individual and class claims of the intervenor-plaintiffs, John F. Knight, Jr. et al., under Title VI of the 1964 Civil Rights Act are DISMISSED without prejudice.

3. This case is assigned to the undersigned and shall be hereafter designated as *John F. Knight, Jr., et al. v. State of Alabama et al.*, CV 83-P-1676-S.[1]

4. The undersigned knows of no reason why he might be disqualified under 28 U.S.C. § 144 or § 455. Attached to this order is a description of the relationships the undersigned and members of his family have had with any

[1] Acting pursuant to the mandate of the Court of Appeals, the undersigned directed that the case be reassigned as a result of a random drawing by the Clerk from among the eligible, active judges, of this court. The undersigned was selected in that drawing.

of the parties to this litigation. The undersigned does not believe that these relationships constitute a ground for disqualification and is not making this disclosure as part of an inquiry whether the parties desire under 28 U.S.C. § 455(e) to waive a ground for disqualification. The disclosure rather is being made in an abundance of precaution in view of the prior proceedings in this case that resulted in disqualification of the judge to whom the case was initially assigned and in recognition of the possibility that the parties to the litigation may have a different position regarding the significance of such matters than the undersigned. Any party that desires to submit an affidavit under § 144 or a motion under § 455, whether on the basis of these matters or for other reasons, should do so promptly.

5. A status and scheduling conference is set for Monday, December 21, 1987, at 9:00 a.m. The original plaintiff, the United States of America, need not attend the conference if it is not going to file an amended complaint.

6. Counsel are directed to review the service list attached to this order and (a) send a copy of the order to any other counsel who should have received notice and (b) advise the court of any corrections to the service list. A maximum of two attorneys for each party is permitted.

This the 4th day of December, 1987.

/s/ Sam C. Pointer, Jr.
SAM C. POINTER, JR.
United States District Judge

[Attachments Omitted]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

No. CV 83-P-1676-S

JOHN F. KNIGHT, JR., *et al.*,
Plaintiffs,

-vs.-

STATE OF ALABAMA, *et al.*,
Defendants.

ORDER

As a result of discussions at a status and scheduling conference held this date, at which all parties appeared by counsel, the following orders are entered:

1. The "Motion to Stay Proceedings," filed on December 16, 1987, is DENIED.

2. The "Renewed Motion to Intervene," filed December 16, 1987, by the University Legal Defense Fund and the National Alumni Normalite Association, shall be submitted for decision without oral argument as of January 25, 1988, based on any briefs filed by January 20, 1988. (A copy of this order shall be mailed to Demetrius Newton, in addition to the attorneys on the service list.)

3. Attached is an amended service list indicating the attorneys on whom motions, orders, briefs, etc. shall be served. Counsel for those defendants which have entered into consent judgments with the United States may, but are not required to, attend future conferences and hearings.

4. Any amended complaint on behalf of the United States shall be filed by February 21, 1988. Any amended

complaint on behalf of John F. Knight, Jr., et al., as plaintiffs, shall be filed by March 21, 1988. Any requests to intervene as a plaintiff shall be filed, with a copy of the proposed complaint, by March 21, 1988.

5. The contents of the Memorandum of Opinion previously filed in this case, as reported in 628 F.Supp. 1137, shall—from part I on page 1140 through the first column on page 1170—be treated as if incorporated into a request for admission under FED. R. CIV. P. 36. Each party is directed to file and serve by February 21, 1988, its response to such Rule 36 request, indicating (by deletion or interlineation) the extent to which it contests the matters recited therein. Objections to such matters (whether on the grounds of relevancy, lack of prior personal knowledge, or lack of evidence at the prior trial) shall not be used to avoid indicating whether the party contests the truth of such matters.

This the 21st day of December, 1987.

/s/ Sam C. Pointer, Jr.
SAM C. POINTER, JR.
United States District Judge

[Attachments Omitted]